



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

April 12, 1994

Honorable Ann W. Richards  
Governor  
State of Texas  
P.O. Box 12428  
Austin, Texas 78711

Letter Opinion No. 94-036

Re: Whether a corporation that contracts with the state to provide child care services to state employees may enroll children of non-state employees (ID# 24667)

Dear Governor Richards:

You ask whether the Texas Child Care Development Board may open child care centers operated under its jurisdiction to non-state employees. In particular, you note that the provider at the Capitol Complex Child Care Center has asked whether it may enroll children of non-state employees in the center if enrollment falls below capacity. It is our understanding that the provider proposes to pay the state fair market value for the use of the facility by such children.

The child care facility at issue here was also the subject of Attorney General Opinion JM-1156 (1990). In that opinion, one of the questions presented was whether leasing space for child care facilities at a rate lower than fair market value would be a donation of public property to a private interest, and therefore a violation of article III, section 51 of the Texas Constitution. Attorney General Opinion JM-1156 noted that the lease in question had the public purpose of improving employee performance by reducing absenteeism, tardiness, and excessive turnover, and increasing morale, job satisfaction, and productivity. Attorney General Opinion JM-1156 (1990) at 5.

An issue has arisen as to whether permitting a child care facility for state workers to enroll any child of non-state workers would vitiate this public purpose. In our view, this is not the case. Certainly, the primary mission of any such facility must be care of the children of state employees, and spaces must not be taken from such children to enroll children who are not the offspring of state workers. However, we do not believe that allowing some non-state employee children to be enrolled if enrollment falls below capacity would negate the public purpose of the state's provision of space or funds for the center.

Obviously, the state must receive an adequate *quid pro quo* for any private use of state-owned or state-funded facilities, such as the payment of fair market value for the use of the facility by non-state employees. We believe that the determination of fair market value must take into account the value of all goods and services provided to the lessee.

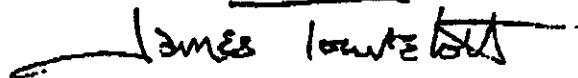
Beyond that, however, our view is that such children and their parents would merely be incidental beneficiaries of the expenditure of state funds for a legitimate public purpose. Cf. *Barrington v. Cokinos*, 338 S.W.2d 133, 140 (Tex. 1960); *Brazoria County v. Perry*, 537 S.W.2d 89, 90-91 (Tex. Civ App.--Houston [1st Dist.] 1976, no writ).<sup>1</sup>

Nor, in our view, is there any statutory bar to such an arrangement. Chapter 663 of the Government Code, the enabling legislation for child care services for government employees, gives the Child Care Development Board authority to set the rates for leasing facilities, give the specifications for sites, set performance standards, establish enrollment application procedures, set the number of children who may be served, monitor the facilities, and establish methods to administer and supervise the program. Nothing in chapter 663 suggests that children of non-state employees are prohibited from being enrolled in such facilities.

### S U M M A R Y

Permitting some children of non-state employees to be enrolled in a day care center for children of state employees does not constitute a *per se* violation of article III, section 51 of the Texas Constitution.

Very truly yours,



James E. Tourtelott  
Assistant Attorney General  
Opinion Committee

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<sup>1</sup>Such a result would, we note, also be consistent with a series of opinions in which this office has found the leasing of medical facilities to private parties consistent with the requirements of article III, sections 51 and 52 of the Texas Constitution. See, e.g., Attorney General Opinions DM-66 (1991); H-966 (1977); H-912 (1976).